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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CODY NICHOLS, an individual, Plaintiff, vs. DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee For Morgan Stanley Loan Trust 2006-HE4, an entity of unknown form; DECISION ONE MORTGAGE COMPANY, LLC, a North Carolina Limited Liability Company; and DOES 1-10, inclusive, Defendants.	CASE NO. 07CV2039L (NLS) **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

PLAINTIFF, Cody Nichols ("Plaintiff") submits this points and authorities in support of his Application For Temporary Restraining Order ("TRO") and Preliminary Injunction.

I. FACTUAL BACKGROUND

On or about February 24, 2006, Plaintiff consummated a consumer credit transaction

("Transaction") to refinance his principle dwelling/residence located at 2010 Rancho Manzanita, Boulevard, California 91905 (the "Plaintiff's home"), by entering into a note with defendant Decision One Mortgage Company, LLC ("Decision One") in the amount of Two Hundred Ninety Four Thousand Dollars ($294,000.00)(the "loan"), secured by a deed of trust on Plaintiff's home. After February 24, 2007, the ownership of the loan was transferred to defendant Deutsche Bank National Trust Company, as trustee for the Morgan Stanley Loan Trust 2006-HE4 ("Deutsche Bank") and the servicing of the loan was transferred to American Servicing Company ("ASC") under loan number 1127063815.

The Transaction was required to comply with the Truth In Lending Act ("TILA") in that the loan was used for personal, family, household purposes, the Transaction was subject to a finance charge and payable by written agreement in more than four installments, and the Defendants were creditors within the meaning of 15 U.S.C. §1602(f) and Reg. Z, § 226.2, note 3.

In the course of consummating the Transaction, a notary public was sent to Plaintiff's home late on a Friday evening, approximately 8:00 p.m. to sign the Transaction documents. *Cody Nichols Dec*. para. 3; *Pam Nichols Dec*. para. 4. Plaintiff, his mother ("Pam Nichols"), and the notary public were present. *Cody Nichols Dec*. para. 4; *Pam Nichols Dec*. para. 4. Plaintiff, Pam Nichols, and the notary public sat at the kitchen table and Plaintiff was instructed, by the notary public, to sign certain pages as she flipped through the pages of the Transaction documents. *Cody Nichols Dec*. para. 4; *Pam Nichols Dec*. para. 5. Plaintiff was rushed and not given an adequate opportunity to read the Transaction documents. *Cody Nichols Dec*. para. 5. The entire signing process took less than thirty minutes. *Cody Nichols Dec*. para. 5; *Pam Nichols Dec*. para. 5. At the conclusion of signing the Transaction documents, all Transaction documents, whether signed by Plaintiff or not, were picked up and taken by the notary public. *Cody Nichols*

Dec. para. 6; *Pam Nichols Dec*. para 6. Plaintiff was told by the notary public that he would receive a copy of all Transaction documents by mail in the future. *Cody Nichols Dec*. para. 6; *Pam Nichols Dec*. para. 6. Plaintiff never received any of the Transaction documents in the mail. *Cody Nichols Dec*. para. 7. Defendant Decision One failed to provide Plaintiff with required "material" disclosures.

More than 2 ½ months after the consummation of the Transaction, on or about May 16, 2006, TSI, Escrow, Inc. mailed a package containing unsigned Transaction documents to Pam Nichols. *Pam Nichols Dec*. para. 7. Included within the documents mailed to Pam Nichols were Notices of Right to Cancel, which contained an erroneous date for the expiration of the cancellation period, i.e., February 28, 2006, which had already past before Pam Nichols received the package. *Pam Nichols Dec*. para. 7. After seeing the Notices of Right to Cancel contained in the package, Pam Nichols believed the right to cancel had already expired and Plaintiff was stuck with the loan. *Pam Nichols Dec*. para. 7.

As set forth in 15 U.S.C. §1635 and Reg. Z, 226.15, the failure to provide material disclosures extended Plaintiff's right of rescission to three years. 15 U.S.C. §1635; Reg. Z, 226.15; *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699 (9th Cir. 1986). Reg. Z 226. 15 and 226.23 require that the borrower receive two copies of the Notice of Right to Cancel in a form he can keep, which must contain the date of expiration of the cancellation period. The Notice of Right to Cancel is a material disclosure. *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 703-704 (9th Cir. 1986).

On October 16, 2007, within the three year period, Plaintiff rescinded the Transaction by mailing a notice of rescission, as required by TILA, to defendant Decision One and Deutsche Bank. *See*, Exhibit "A" to *Complaint.* The notice of rescission was received by defendant Deutsche Bank on October 17, 2007. *See*, Exhibit “B” to *Complaint.*

On or about June 11, 2007, Defendant Deutsche Bank caused to be recorded a Notice of Trustee’s Sale, which currently has October 30, 2007 scheduled as the sale date for Plaintiff’s home. *Raymond Decl.*, paras. 4, 5, 8; Exhibit “DLR-A”. Contained in the Rescission Notice was a request to postpone or cancel the scheduled Trustee’s sale.

On October 16, 2007, Plaintiff’s attorney sent via facsimile to ASC, the servicer, a copy of the Recession Notice along with a request to postpone or cancel the scheduled Trustee’s sale. *Raymond Decl.*, para. 7; Exhibit “DLR-B”. Neither any defendant nor ASC has contact Plaintiff’s counsel. *Raymond Decl.*, para. 8. Instead, Defendants’ changed the scheduled sale date from November 2, 2007 to the earlier date of October 30, 2007. *Raymond Decl.*, para. 8. On October 19, 2007, having not heard from Defendants nor any of their agents, Plaintiff filed the above entitled Complaint, which contains a request to enjoin Defendants during the pendency of this action, and permanently thereafter, from instituting, prosecuting, or maintaining foreclosure proceedings on Plaintiff’s home, from recording any deeds or mortgages regarding Plaintiff’s home or from otherwise taking any steps to deprive Plaintiff of ownership of Plaintiff’s home. A copy of the Complaint is herein attached and incorporated by reference as Exhibit “TRO-A”.

Even though Defendants were aware of the rescission, Defendants, contrary to complying the requirements of TILA, have willfully and intentionally proceeded to immediately foreclose upon Plaintiff’s home by **scheduling a trustee’s sale for October 30, 2007**. Only the issuance of an injunction will prevent the imminent foreclosure sale of Plaintiff’s home and give Plaintiff the opportunity to be heard on the merits.

II. ARGUMENT

The purpose of a TRO is to preserve the status quo pending a full hearing on a preliminary injunction. *Bronco Wine Company v. United States Department of Treasury*, 997 F. Supp. 1309, 1313 (E.D. Cal. 1996). A party seeking a TRO must satisfy the same test required for the issuance of a preliminary injunction. *Id.* A party seeking preliminary injunctive relief under Federal Rule of Civil Procedure 65 must show (1) a likelihood of success on the merits, (2) a significant threat of irreparable harm, (3) that the balance of hardships favor the applicant, and (4) whether any public interest favors granting an injunction. *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003)(citing *Dollar Rent A Car of Wash. Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985)) *vacated and remanded on other grounds* by *Gonzalez v. Raich* 545 U.S. 1 (2005).

A. THE MERITS OF PLAINTIFF'S CLAIMS

TILA and Reg Z contain detailed disclosure requirements for consumer loans. A creditor's violation of TILA allows the borrower to rescind a consumer loan secured by the borrower's primary dwelling. *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 703-704 (9th Cir. 1986). Technical or minor violations of TILA or Reg Z, as well as major violations, impose liability on the creditor and entitle the borrower to rescind. *Id.* To insure that the consumer is protected ....[TILA and Reg Z must] be absolutely complied with and strictly enforced. *Id.*

a. TILA VIOLATIONS

Under TILA, certain documents, including but not limited to two completed Notices of Right to Cancel were required to be delivered in a timely manner to Plaintiff, in a form that he could keep. 15 U.S.C. § 1635; Reg. Z, 226.15, 226.17.

Plaintiff did not receive "material" disclosures, including but not limited to Notices of Right to Cancel containing the correct date of expiration of the cancellation period.

The failure to provide "material" disclosures, including but not limited notices of right to cancel that state the "specific" date that the cancellation period expires on the Notice of Right to Cancel was a violation of TILA, which gave Plaintiff the extended three year right of rescission as provided in TILA at 15 U.S.C. §1635 and Reg. Z, 226.15. *Id.*; *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 703-704 (9th Cir. 1986).

Plaintiff exercised his right of rescission within three years. Therefore, the security interest upon which the Defendants' are basing their foreclosure sale is void.

b. THE EFFECT OF RESCISSION IS THAT NO VALID SECURITY INTEREST EXISTS UPON WHICH DEFENDANTS CAN MAINTAIN THEIR FORECLOSURE ACTION

TILA and Reg Z specifically describe the steps that must occur and their timing once a consumer rescinds. 15 U.S.C. §1635(b); Reg Z 226.23(d).

Step 1: Upon rescission by a consumer, the security interest (in this case **the deed of trust) is automatically void** and the consumer owes no finance or other "charges". "Other" charges include any closing costs even if they were paid to a third party. Reg Z, Official Staff Commentary, 226.23(d)(2)-1.

Step 2: Within 20 days of receipt of a consumer's notice of rescission, the creditor shall return to the consumer any money or property given by the consumer and shall take any action necessary or appropriate to reflect the termination of the security interest.

Step 3: Once the creditor performs its obligations, the consumer must tender the balance due to the creditor.

Step 4: If the creditor does not take possession of the property within 20 days after tender by the consumer, ownership in the property vests in the consumer.

Plaintiffs mailed their notice of rescission to Defendants on August 3, 2007. Under the statutory scheme, the deed of trust against Plaintiffs' residence is void and Defendants had 20 days from the date of rescission to release the deed of trust.

The deed of trust that Defendants have based their foreclosure action upon is void and unenforceable. **Yet, Defendants have scheduled a sale date of Plaintiff's home for October 30, 2007.**

B. PLAINTIFFS' WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF NOT GRANTED

a. Loss of Personal Residence Is Irreparable Harm

Defendants are attempting to foreclose upon Plaintiff's personal, family home. Plaintiff lives in his home with his mother and ill father. If injunctive relief is not granted, Plaintiff will suffer the irreparable harm of his home being sold and potentially lost to him forever. Plaintiff's home is unique and if it is sold to a bona fide purchaser, Plaintiff will be unable purchase the exact same home anywhere else. In addition, if Defendants' foreclosure sale were permitted to happen, Plaintiff, his mother, and his ailing father would be forced to move from their home, and it would subject them to the irreparable harm of public humiliation. *Cody Nichols Dec*. paras. 8, 9. Plaintiff's mother fears that being forced from their home would kill her husband. *Pam Nichols Dec*. para. 8.

b. Deprivation of TILA Rights Is Irreparable Harm

Permitting Defendants to proceed with the foreclosure sale of Plaintiff's home could extinguish Plaintiff's right of rescission and his claims against Defendants.

TILA provides that the right of rescission is extinguished upon the transfer of the property. Reg. Z 226.23(a)(3); Reg Z, *Official Staff Commentary*, 226.23(a)(3). "A sale or transfer of the property need not be voluntary to terminate the right to rescind." Reg Z, *Official Staff Commentary*, 226.23(a)(3). "For example, a foreclosure sale would terminate an unexpired right to rescind." *Id.*

If Defendants are not enjoined from selling Plaintiff's home by foreclosure sale, Plaintiff may suffer the irreparable harm of losing his TILA rights. If Plaintiff proves violations of TILA, that he had the right to rescind, and that he suffered damages from Defendants' violations of TILA, Plaintiff could be left with no remedy. Furthermore, failing to enjoin Defendants would lead to Defendants being rewarded for disregarding Plaintiff's rights.

Allowing Defendants to proceed with the foreclosure sale and extinguish Plaintiff's rights under TILA, could have far reaching ramifications, such as the negative effect of encouraging creditors to disregard Notices of Rescission from borrowers and immediately proceed to foreclosure in a race to sell the property at a Trustee's sale before the borrower could effectuate his rescission rights through the court process.

Based on the forgoing, if Defendants are not enjoined, Plaintiff will suffer irreparable harm from the loss of their personal residence and from the possible loss of their rights under TILA for which he will have no adequate remedy.

C. THE BALANCE OF THE HARDSHIPS FAVORS PLAINTIFFS

The irreparable harm Plaintiff will suffer if his residence is sold through foreclosure far outweighs any harm to Defendants. If the foreclosure sale is permitted to happen and Plaintiff could have ultimately succeeded on the merits of his claims, Plaintiff will have suffered irreparable harm. However, if Plaintiff does not succeed on his claims, Defendants would be free to continue with their foreclosure sale of Plaintiff's home.

Thus, if Plaintiff does not prevail on his claims, Defendants will have ultimately lost nothing in affording Plaintiff the opportunity to have his claims adjudicated.

D. PUBLIC INTEREST FAVORS GRANTING INJUNCTION

The public interest will certainly be served by the issuance of injunctive relief in this case. To allow the foreclosure sale of Plaintiff's home without first determining the validity of the underlying deed of trust undermines public interest. The failure of giving Plaintiff any Transaction documents at the consummation of the Transaction, along with the erroneously dated Notices of Right to Cancel sent to Pam Nichols raise serious doubts as to the validity of the deed of trust that is the subject of the foreclosure proceedings. To allow the foreclosure proceeding to go any further will not only be a gross injustice, but will violate all notions of public policy as well as frustrating the clearly expressed intent of Congress in providing for the rescission remedy in TILA.

E. NO ADDITIONAL SECURITY SHOULD BE REQUIRED FROM PLAINTIFFS

Rule 65(c) requires that in order for a restraining order or preliminary injunction to be issued, a security must be given by the applicant, in such sum as the court deems proper. FRCP 65(c) . Defendants have not removed the security interest, i.e., deeds of trust from Plaintiff's home, and continue to maintain said interest in Plaintiff's home.

According to tax records, Plaintiff's home is 1980 square feet with three bedrooms and two bathrooms on 9.98 acres of land. According to MLS, current listings of SFR with 9 to 11 acres have asking prices ranging from $343,900 to $399,000. *Raymond Decl.*, Exhibit "DLR-C". According to MLS, sales of SFR with 9 to 11 acres in the past two years range from $275.000 to $435,000. *Raymond Decl.*, Exhibit DLR-D.

According to the Notice of Trustee's Sale, Defendants claim that Plaintiff owes approximately $311,548.29. Defendants are in first position. Using an average sale price of $353,750 within the last two years and Defendants' inflated number, Plaintiff would have approximately $42,201.71 in equity. Thus, Defendants have approximately $42,201.71 in additional security for any potential costs and damages Defendants may incur or suffer if Defendants are found to have been wrongfully enjoined or restrained.

On the grounds set forth above, Plaintiffs request that the Court find that the deed of trust, which Defendants have failed and refused to remove, and continue to maintain is sufficient security to meet the requirements of FRCP 65(c) and no additional security will be required from Plaintiff.

III. CONCLUSION

Plaintiff respectfully submits that he has shown that a TRO, and then, a preliminary injunction should issue because while comparatively great harm may result from withholding this relief, little injury will flow from granting it. Further, Plaintiff respectfully submits on its face, Plaintiff's case has sufficient merit to support a finding that the status quo should be preserved until the controversy can be disposed of on the merits.

Plaintiff requests that the Court grant the TRO and then the preliminary injunction to restrain and enjoin Defendants, their agents, servicers, assigns, employees, officers, attorneys, and representatives and those in active concert or participation with Defendants or them, pending trial of this action, from engaging in or performing any act to deprive Plaintiff of his ownership and/or possession of the real property located at 2010 Rancho Manzanita, Boulevard, California 91905, including but not limited to instituting, prosecuting, or maintaining foreclosure or sale proceedings on Plaintiff's home, from recording any deeds or mortgages regarding Plaintiff's home or from otherwise taking any steps whatsoever to deprive Plaintiff of ownership and/or possession in Plaintiff's home, and **in particular from proceeding with the sale of Plaintiff's home scheduled for October 30, 2007.**

Date: October 25, 2007

/s/ Deborah L. Raymond
Deborah L. Raymond, Esq.
Attorney for Plaintiff